Garner/Morrison, LLC and International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL–CIO–CLC *and* Southwest Regional Council of Carpenters. Cases 28–CA–021311 and 28–CB–006585

August 27, 2018

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS PEARCE AND EMANUEL

The issue presented in this case, on remand from the United States Court of Appeals for the District of Columbia Circuit, is whether it is distinguishable from *Coamo Knitting Mills*, 150 NLRB 579 (1964), in which the Board dismissed allegations that the presence of management personnel at a meeting where employees signed authorization cards violated Section 8(a)(1) and (2) of the Act. The court, in remanding this case, held that the "Board evaluated nearly identical conduct and the same legal questions here and in *Coamo*" and declared that the "only material difference was the result." *NLRB* v. *Southwest Regional Council of Carpenters and Garner/Morrison LLC,* 826 F.3d 460, 466 (D.C. Cir. 2016). For the reasons that follow, we agree with the court that the instant case is not materially distinguishable from *Coamo*, to which we adhere, and thus that dismissal of the allegations here is warranted.

On May 27, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] finding that the presence of Respondent Garner/Morrison's representatives at a meeting where Respondent Southwest Regional Council of Carpenters (Carpenters) distributed authorization cards to Garner/Morrison's employees constituted unlawful surveillance and assistance tainting the Carpenters' showing of majority support based on those cards. The Board therefore found that Garner/Morrison violated Section 8(a)(1) of the National Labor Relations Act by surveilling its employees and Section 8(a)(2) by assisting the Carpenters in obtaining authorization cards and granting 9(a) recognition to the Carpenters based on those cards. The Board further found that the Carpenters violated Section 8(b)(1)(A) of the Act by accepting the assistance and recognition and entering into a new collective-bargaining agreement with Garner/Morrison. The Respondents filed a motion for reconsideration of the Board's decision, arguing that *Coamo Knitting Mills* required a contrary result. By unpublished Order dated August 18, 2011, the Board denied the motion.

The Respondents each filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement. On June 21, 2016, the court granted the petitions for review and remanded this proceeding to the Board. The court held that it could not reconcile the Board's decision in this case with *Coamo,* which presented both "similar facts" and "mirror" image "legal issues," and that the Board had presented no adequate justification for distinguishing *Coamo*. 826 F.3d at 465. The court remanded this case to the Board to distinguish *Coamo* or explain its departure from established precedent. On September 13, 2016, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position with respect to the issues raised by the remand. The Respondents filed statements of position.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the court's remand. Because *Coamo* is not materially distinguishable from this case, we reverse our prior decision and dismiss the complaint.

Facts

Garner/Morrison is an employer in the construction industry. In December 2003, Garner/Morrison entered into a collective-bargaining agreement with the Carpenters, recognizing it as the bargaining representative of its carpenters as well as its painters and tapers unless they were covered by an agreement with the Painters Union. Garner/Morrison and the Carpenters entered into a similar successor agreement in 2006. In 2004, Garner/Morrison executed two Section 8(f) collective-bargaining agreements with the International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL–CIO–CLC (Painters), one covering painters and the other covering tapers. Both agreements expired on March 31, 2007.

Garner/Morrison's principals separately met with representatives of the Painters and the Carpenters to determine representation for Garner/Morrison's painters and tapers upon the March 31 expiration of the 8(f) agreements with the Painters. Garner/Morrison was unhappy with the wage increases sought by the Painters in these discussions. Accordingly, Garner/Morrison informed the Carpenters that it was not entering into a successor agreement with the Painters covering painters and tapers.

[1] *Garner/Morrison, LLC*, 356 NLRB 1301 (2011), affirming in part 353 NLRB 719 (2009).

[2] The General Counsel did not file a statement of position.

In response, the Carpenters assured Garner/Morrison that its painters and tapers would automatically be covered pursuant to their 2006 contract when the Painters' agreements expired, and that the painters and tapers would be eligible for immediate coverage under the Carpenters' health insurance plan.

The Carpenters scheduled a meeting on April 2 with the painters and tapers to explain the Carpenters' contract and benefits and ensure continued health insurance coverage.[3] The Carpenters selected the time and place for the meeting and paid for the hotel conference room in which it was held. Garner/Morrison did not require its painters and tapers to attend the meeting, which was held on nonworking time. Garner/Morrison part-owner Chris Morrison informed the employees in brief remarks that the Painters' agreements had expired and that "he thought the Carpenters was better for the Company and for the men," "[t]his is probably the way we want to go," and "we think it is a good deal." The Carpenters' officials then gave the employees an hour-long power point presentation about their contract, wages, and benefit plans. At its conclusion, the Carpenters directed the employees to the back of the room, where representatives of the Carpenters' health insurance and pension funds provided them brochures, medical and dental enrollment forms, beneficiary cards, and HIPAA authorization forms. At the same time, Carpenters' representatives went to the back of the room and distributed union authorization cards.

While this was occurring, Garner/Morrison's three owners and one supervisor remained in the front of the conference room approximately 60–70 feet away from the employees and Carpenters' representatives in the back of the room. They could not see the documents the employees were signing, and they did not know the Carpenters planned to distribute authorization cards at the meeting. At the conclusion of the meeting, the Carpenters presented Garner/Morrison's owners with authorization cards signed by a majority of the painters and tapers. Garner/Morrison promptly signed a 9(a) recognition agreement with the Carpenters.

Analysis

As stated by the court in remanding, "*Coamo* closely resembles this case." 826 F.3d at 465. In *Coamo*, the employer's vice president conducted employee shift meetings where he praised the union, stated that the union would soon solicit employees to join, and urged the employees to do so. 150 NLRB at 585. The next day, at a meeting held on the factory floor at the shift change, the vice president introduced representatives of the union, who were then permitted to address the approximately145–150 assembled employees and to distribute union authorization cards. Id. at 586. Although the vice president departed after the introductions, a plant manager remained on the factory floor during the meeting and while the union distributed the authorization cards. Id. The trial examiner (now called an administrative law judge) found that the presence of the plant manager at the meeting while the union solicited employees to sign authorization cards "necessarily had a coercive effect" on the employees, and he therefore concluded that the employer violated Section 8(a)(1) and (2) of the Act. Id. at 589. The Board disagreed. Reversing the judge, the Board held that "the mere presence" of the plant manager was insufficient to support a finding that the employees were coerced in their selection of the union or that the card majority was tainted. Id. at 581. The Board emphasized that the manager stood apart from the employees where he "could not and did not see any employees signing the cards," and that the employer made no attempt to ascertain which employees attended the meeting. Id. at 581–582.

In its decision remanding, the court compared the key features of *Coamo* and the instant case and found no material difference other than the outcome. Thus, in both cases, the union held a meeting for the company's employees at which employer representatives made statements in support of the union. In both, employer representatives were present while employees were solicited to sign authorization cards, and the signing of those cards resulted in majority support for the union. Finally, in both cases, the employer representatives stood apart from the employees where they could not see the employees signing authorization cards. See 826 F.3d at 465. As discussed above, in *Coamo,* the Board found that these circumstances were insufficient to support a finding that the employees were coerced in their selection of the union or that the authorization cards were tainted. Absent any material differences between *Coamo* and this proceeding, the same conclusion is warranted in this case.

Our dissenting colleague does not dispute these core similarities between the two cases, described by the court as "nearly identical conduct" posing "the same legal questions." 826 F.3d at 465. The dissent instead cites marginal distinctions, which are insufficient to substan-

[3] From Garner/Morrison's standpoint, the purpose of the meeting was to explain the Carpenters' benefit structure and to assure employees that their coverage would be seamless. Garner/Morrison did not intend the offsite meeting as an opportunity for the Carpenters to solicit authorization cards. Indeed, as discussed below, it was entirely unaware that the Carpenters would do so.

tively distinguish *Coamo*.[4] For example, the dissent cites a higher ratio of employer representatives to employees at the meeting here compared to the one held in *Coamo*. In both cases, however, the employer representatives were not in a position to see what forms employees were signing. The employees in this case therefore had no more reason than the employees in *Coamo* to reasonably fear that their employer was monitoring whether they executed, or refused to execute, authorization cards. The dissent also compares the grant of recognition in each case, at the conclusion of the meeting here but 2 days after the meeting in *Coamo*. There is no prescribed waiting period for recognition upon presentation of authorization cards, however,[5] and the *Coamo* decision ascribes no significance to this temporal factor. Nor did the *Coamo* decision find any significance in which party—union or employer—initiated contact, as does the dissent.[6] Finally, while our colleague points out that Garner/Morrison and the Carpenters were aware of rival union activity and the employer in *Coamo* was not, he does not assert that this resulted in meaningfully distinguishable conduct. In fact, it was the employer in *Coamo* that provided physical assistance (meeting space on the factory floor) to the union, unlike Garner/Morrison, which did not take such measures in favor of the Carpenters despite its knowledge of union rivalry.[7] The knowledge of rival union activity here thus did not result in more deleterious conduct by Garner/Morrison than by the employer in *Coamo*. The key parallel question in each case remains whether the presence of management at a union meeting where employees signed authorization cards is unlawful.

Moreover, our dissenting colleague overlooks that the meeting in this case occurred after Garner/Morrison lawfully ended its 8(f) relationship with the Painters covering painters and tapers and entered into an 8(f) relationship with the Carpenters as to those employees.[8] In this context, the presence of Garner/Morrison's executives at the April 2 meeting was not coercive. As noted, the purpose of meeting was to announce the change in representative, to inform the employees about their new contract, and to enroll the employees in the Carpenters' benefit plans. As the administrative law judge properly observed, it is not coercive for an employer in the construction industry to inform employees that it has ended its 8(f) relationship with one union and entered into an 8(f) relationship with another union, or to describe the benefits it has negotiated with the second union, or to inform employees how to obtain those benefits. See 356 NLRB at 1315–1316. Nor is it unlawful for an employer in a rival union organizing situation to express a preference for one union in the absence as here of threats or unlawful promises. See *Amboy Care Center*, 322 NLRB 207, 207–208 (1996).

In sum, while the presence of employer representatives at a meeting where authorization cards are distributed might, under different circumstances, constitute unlawful surveillance, interference, or assistance in violation of Section 8(a)(1) and (2) of the Act, and lead to unlawful acceptance of assistance in violation of Section

[4] The dissent's assertion that *Coamo* is of "doubtful precedential value" is unsupported.

[5] See *Tecumseh Corrugated Box Co.*, 333 NLRB 1, 8 (2001) (Board law does not prohibit employer from granting recognition immediately based on authorization cards gathered at workplace meeting).

[6] Of course, contact from Garner/Morrison to the Carpenters is hardly surprising as they were parties to a collective-bargaining agreement, and Garner/Morrison was considering its options at the conclusion of its 8(f) agreement with the Painters.

[7] Indeed, the dissent ignores that the facts in *Coamo* provide stronger evidence of coercion and assistance than do the facts in this case. As noted, in *Coamo*, the vice president informed the employees that the union would soon solicit them to join, he encouraged them to do so, and, the next day, he permitted the union to meet with the employees on company property for the specific purpose of soliciting authorization cards upon which the employer intended to grant 9(a) recognition to the union. In contrast, Garner/Morrison's officials did not even know that the Carpenters planned to distribute authorization cards at the April 2 meeting, which was not held on company property.

[8] We agree with the Respondents that they had a valid 8(f) agreement as of April 1, the day before the meeting. The credited testimony of Carpenters' contract administrator Hubel and Garner/Morrison part-owner Chris Morrison establishes that the Respondents orally agreed, prior to the expiration of the Garner/Morrison-Painters' 8(f) agreement on March 31, 2007, to apply the 2006 Master Agreement to the painters and tapers upon the expiration of those 8(f) agreements. Hubel testified that shortly before the Painters' agreements expired, Morrison informed him that Garner/Morrison was not going to renew its agreements with the Painters, and Hubel responded, "Fine, [the Carpenters] would like to represent your drywall finishers [i.e., painters and tapers]." Morrison then asked "what they had to do," and Hubel answered: "You don't have to do anything. As long as you don't sign a new contract or an extension [with the Painters], our contract kicks in, and then they will be covered by the Carpenters agreement." Hubel further testified that the painters and tapers were covered by the 2006 Master Agreement as of April 1. Morrison similarly testified Garner/Morrison was "actively seeking for the Carpenters to be the representative of our tapers and painters" and that he set up a meeting with the Carpenters during the week ending March 31 to accomplish that and to discuss whether the employees would experience a lapse in benefit coverage when the Carpenters agreement "rolled" in. We find that, by orally agreeing to apply the 2006 Carpenters Master Agreement to the painters and tapers upon the expiration of the Painters' agreements at a time when the Carpenters had not established majority status among those employees, the Respondents entered into a valid 8(f) collective-bargaining agreement that was effective on April 1. See *E.S.P. Concrete Pumping*, 327 NLRB 711, 713 (1999) ("reaffirm[ing] in the 8(f) context the Board's longstanding rule that an employer and a union may enter into a collective-bargaining agreement without having reduced to writing their intent to be bound"); *Local Union 530 (Cape Construction Co.),* 178 NLRB 162, 164 (1969) (affirming judge's finding that construction industry employer entered into a lawful 8(f) agreement by orally agreeing to be bound).

8(b)(1)(A) of the Act, the record as a whole does not support a finding of illegality in the instant case. The Board in *Coamo* found lawful conduct that is materially indistinguishable from that of the Respondents here. Accordingly, we find that Garner/Morrison did not engage in unlawful surveillance in violation of Section 8(a)(1) of the Act, and we shall dismiss that allegation. We further find that the authorization cards were not tainted, and therefore the Carpenters represented an uncoerced majority of the employees on April 2, when Garner/Morrison extended 9(a) recognition to the Carpenters and the Respondents entered into a new memorandum agreement. We therefore dismiss the 8(a)(2) and 8(b)(1)(A) allegations as well.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 27, 2018

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John F. Ring, Chairman

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONSBOARD

MEMBER PEARCE, dissenting.

I would affirm the Board's prior Decision and Order,[1] in which the Board found that the presence of Respondent Garner/Morrison's representatives at a meeting while Respondent Southwest Regional Council of Carpenters (Carpenters) solicited Garner/Morrison's employees to sign authorization cards constituted unlawful surveillance and assistance and tainted the Carpenter's showing of majority support based on those cards.

Contrary to the majority, I find unpersuasive the Respondents' reliance on a Board decision, over 50 years old, declining to find unlawful assistance and coercion in circumstances that were, in some respects, similar to those presented here. See *Coamo Knitting Mills, Inc*., 150 NLRB 579 (1964). In my view, *Coamo* is of doubtful precedential value in light of the Board's subsequent decisions defining what constitutes unlawful coercion and assistance. In any event, *Coamo* is readily distinguishable on its facts. Therefore, I find it is not controlling.

The Board has long recognized that the test of interference, restraint and coercion under Section 8(a)(1) is an objective one that turns on whether the conduct has a reasonable tendency to interfere with the free exercise of rights under the Act. See, e.g., *CWI of Maryland, Inc*., 321 NLRB 698, 706 (1996) ("It is too well settled to brook dispute that the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act."), enfd. in relevant part 127 F.3d 319 (4th Cir. 1997). Similarly, in order to establish a violation of Section 8(a)(2), it is not necessary to demonstrate a specific motive to interfere with employees' selection of a bargaining representative, or that the employees actually felt coerced by the employer's actions.[2] The gravamen of an unlawful assistance violation is the tendency of the employer's assistance to coerce employees in the exercise of their organizational rights. The Board considers the totality of the circumstances, and the circumstances must be viewed from the employees' prospective, and not, as in *Coamo*, from the prospective of the employer.[3]

Applying these principles to the facts of this case, I find that the presence of Garner/Morrison's executives at a meeting where the Carpenters solicited employees to sign authorization cards constituted unlawful surveillance and reasonably tended to interfere with the employees' freedom of choice in selecting or rejecting the Carpenters as their collective-bargaining representative.

Briefly, the facts are as follows. Garner-Morrison is a construction industry employer engaged in drywall installation and tenant improvement work in office buildings and at commercial construction sites. In 2004, Garner/Morrison entered into two 8(f) collective-bargaining

[1] *Garner/Morrison, LLC*, 356 NLRB 1301 (2011), affirming in part 353 NLRB 719 (2009).

[2] *International Ladies' Garment Workers' Union (Bernhard Altmann) v. NLRB,* 366 U.S. 731, 739 (1961) ("The act made unlawful by [Sec.] 8(a)(2) is employer support of a minority union. . . . . More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.").

[3] *NLRB v. Link-Belt Co.*, 311 U.S. 584, 588 (1941) ("It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice."). See also *Farmers Energy Corp*., 266 NLRB 722, 722 (1983) ("In assessing the impact of a respondent's assistance to a union, the Board examines the totality of circumstances to determine whether the respondent's conduct tainted the union's majority status."). Cf. *The Boeing Co.*, 365NLRB No. 154, slip op. at 16 fn. 82 (2017) ("This emphasis on the employees' perspective furthers the Act's policy of industrial peace.") quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

agreements with the International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL–CIO–CLC (Painters), one covering painters and the other covering tapers. Both agreements bore a March 31, 2007 expiration date. In early 2007, while the parties were engaged in negotiations for successor collective-bargaining agreements, the Painters informed Garner/Morrison that it had obtained an authorization card majority and was seeking voluntary recognition as the 9(a) representative of Garner/Morrison's painters and tapers.[4] In response, Garner/Morrison immediately embarked on a course of conduct designed to insure that its painters and tapers would be represented by the Carpenters rather than the Painters.[5] First, Garner/Morrison contacted the Carpenters and agreed to extend the 2006 Carpenters' Master Agreement to cover the painters and tapers upon the expiration of the Painters' agreements. Then, Garner/Morrison instructed the Carpenters to arrange a meeting with the painters and tapers to announce the change in representative, and Garner/Morrison summoned its employees to the meeting, telling them that it was important that they attend because it affected their health insurance benefits. The meeting was held on Monday, April 2, in a hotel conference room. Twenty-three of Garner/Morrison's 25 painters and tapers attended, along with 15 to 16 Carpenters representatives, 3 Carpenters health insurance representatives, and 4 Garner/Morrison officials (the 3 owners and 1 superintendent). When the employees arrived, Garner/Morrison part-owner Chris Morrison advised them that the Painters' agreements had expired and that the "Carpenters was better for the Company and for the men," "[t]his is probably the way we want to go," and "we think it is a good deal." The four Garner/Morrison top executives then remained in the room while the Carpenters described the benefits of membership and solicited employees to sign authorization cards. Garner/Morrison then immediately recognized the Carpenters as the 9(a) representative of the painters and tapers based on authorization cards obtained at the meeting and, the same day, entered into a memorandum agreement binding it to the terms of the Carpenters' 2006 Master Agreement and any subsequent master agreements until June 30, 2010.

Meanwhile, Garner/Morrison had not notified the Painters that it would cease recognizing it as the representative of its painters and tapers when their collective-bargaining agreement expired. When Garner/Morrison's owners returned to their offices after the April 2 meeting, they discovered copies of representation petitions that the Painters had filed with the Regional Office earlier that day.

Even in the absence of threats or promises of benefits, the actions of Garner/Morrison in contacting the Carpenters, arranging the April 2 meeting, urging all of its painters and tapers to attend the "important" meeting, and jointly conducting the meeting with the Carpenters constituted unlawful assistance. The painters and tapers, a majority of whom had recently executed authorization cards for the Painters, would reasonably understand that the purpose of the meeting was to insure that they selected the Carpenters instead of the Painters as their collective-bargaining representative. Indeed, Chris Morrison's comments that the "Carpenters was better for the Company and for the men" and "[t]his is probably the way we want to go" left no doubt about the reasons they were there. When the additional fact that Garner/Morrison's executives were present while the employees were solicited to sign, and did sign, authorization cards is considered, the conclusion becomes inescapable that the employee sentiment as expressed by their signing of authorization cards on April 2 was coerced.

Contrary to the Respondents and my colleagues, the coercive effect of Garner/Morrison's conduct was not vitiated by the fact that its executives could not see the specific documents the employees were signing. As the Board found in its prior decision "[t]his argument misses the point." 356 NLRB at 1305. When Carpenters representatives directed the employees to go to the back of the room, the employees were effectively being asked to switch their allegiance from the Painters to the Carpenters. Thus, even assuming Garner/Morrison's executives could not see the exact documents that were signed, they could see which employees went to the back of the room, and their presence in the room while the employees were solicited to sign and signed the Carpenters' documents constituted unlawful surveillance that would reasonably tend to coerce the employees in the exercise of their organizational rights. Id.

Coamo, assuming it remains good law, is distinguishable. In *Coamo*, one manager remained on the factory floor during a meeting that was attended by 145–150 employees, and the Board found that the employer made no effort to determine which of its approximately 170 employees were present. Here, in contrast, 4 of Garner/Morrison's highest executives, including 3 owners,

[4] All dates are in 2007, unless otherwise indicated.

[5] Garner/Morrison was already party to a memorandum agreement with the Carpenters that bound the Company to the terms of a 2006 drywall multiemployer master agreement (2006 Master Agreement). The 2006 Master Agreement expressly covered drywall finishing work, as well as carpentry and drywall hanging work, but it contained a jurisdictional waiver pursuant to which the Carpenters agreed not to create a recognition dispute with any signatory employer that was also signatory to a collective-bargaining agreement with the Painters covering drywall finishing work "as long as [the Painters'] contract remains in effect."

remained in the room while the Carpenters solicited authorization cards from 23 employees. Even if Garner/Morrison's executives could not identify the specific documents the employees were signing, they could easily see which of their 25 painting and taping employees attended the meeting, which employees went to the back of the room, and which employees accepted the documents provided by the Carpenters. The employees in this case would therefore have had much greater reason to fear than the employees in *Coamo* that their employer was monitoring whether they executed, or refused to execute, authorization cards, and they would thus have felt pressured to sign.

Additionally, in *Coamo*, the union initiated contact with the employer, and neither was aware of any rival union activity. 150 NLRB at 582, 584–585. The employer in *Coamo* also waited until the next day to recognize the union. Id. at 587. In contrast, in this case, Garner/Morrison contacted the Carpenters and asked it to arrange the April 2 meeting shortly after learning that the Painters had obtained an authorization card majority and was seeking recognition as the 9(a) representative of the painters and tapers. Garner/Morrison also immediately recognized the Carpenters at the April 2 meeting, without examining the cards or authenticating the signatures. This "instantaneous" 9(a) recognition of the Carpenters deprived employees, who reasonably might have felt pressured by the presence of Garner/Morrison's executives to sign authorization cards, of the opportunity to take subsequent action to either revoke their authorization cards or to freely choose whether to be represented by the Carpenters or the Painters through the Board's election procedures.[6]

My colleagues hold that because Garner/Morrison is an employer in the construction industry and it had a preexisting 8(f) agreement with the Carpenters (which lasted one day April 1), its conduct of arranging and attending the April 2 meeting did not constitute unlawful assistance. However, my colleagues' position is at odds with the fundamental principles of Section 8(f). As the Board recognized in *Deklewa*, although Section 8(f) permits employers in the construction industry to enter into "pre-hire" agreements without a showing that the union has majority support, Congress "was mindful of employee free choice principles" and "sought to assure that the rights and privileges accorded employers and unions in . . . Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires." *John Deklewa & Sons*, 282 NLRB 1375, 1380–1381 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Congress therefore provided that an employer may only enter into an 8(f) agreement with a labor organization "not established, maintained, or assisted by any action defined in Section 8(a) of the Act as an unfair labor practice."[7] Congress also explicitly preserved the right of employees to petition for decertification or for a change in bargaining representative during the term of an 8(f) contract.[8] In light of these safeguards, it is clear that in enacting Section 8(f), Congress did not intend to insulate employers and unions from liability for conduct that interferes with employee free choice. However, Garner/Morrison did precisely that by coercing its employees into supporting the Carpenters, and by rushing to recognize and contract with the Carpenters, all for the purpose of thwarting the employees' recently expressed support for the Painters. This plainly falls outside the purpose and protection of Section 8(f).

In sum, considering the totality of the circumstances and the record as a whole, I find that the presence of Garner/Morrison's executives while the Carpenters solicited employees to sign authorization cards constituted unlawful surveillance and assistance and reasonably tended to coerce employees in the free exercise of their

[6] I do not suggest that Garner/Morrison's instant recognition of the Carpenters was unlawful in and of itself. However, when viewed with Garner/Morrison's other conduct, I find that it contributed to the coercive atmosphere of the April 2 meeting and lends further support to a finding that Garner/Morrison provided the Carpenters with unlawful assistance. See *Tecumseh Corrugated Box Co.,* 333 NLRB 1, 8 fn. 22 (2001) (recognizing that although an employer's hasty recognition of a union without an independent card check is not "without more" unlawful, it may contribute to a coercive atmosphere and, in combination with other factors, give rise to an unlawful assistance violation), citing *Vernitron Electrical Components, Inc.,* 221 NLRB 464, 465 (1975).

[7] Consistent with this provision, the Board will find an 8(f) agreement to be invalid if it is a byproduct of an employer's unlawful assistance, such as coercing employees to sign authorization cards or soliciting membership on behalf of the union. The Board will also find that by entering into such an agreement an employer and union violate Sec. 8(a)(2) and 8(b)(1)(A) of the Act respectively. See, e.g., *Bell Energy Management Corp.*, 291 NLRB 168, 169, 178 (1988) (employer unlawfully assisted union by making initial contact, soliciting employee to organize a meeting with union, and making premises available for organizational activities; Board noted that 8(a)(2) assistance invalidated contract whether the parties' relationship was governed by 8(f) or 9(a)); *Bear Creek Construction Co.*, 135 NLRB 1285 (1962) (employer unlawfully assisted union by soliciting membership applications and dues-checkoff forms prior to contracting with union).

[8] The second proviso to Sec. 8(f) states in part: "Provided . . ., That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." In contrast, a contract governed by Sec. 9(a) triggers a "contract bar." Under the contract-bar doctrine, collective-bargaining agreements "for terms up to 3 years will bar an election for their entire period," and "contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years." *General Cable Corp.*, 139 NLRB 1123, 1125 (1962).

right to choose a bargaining representative. Accordingly, I would affirm the Board's prior findings that Garner/Morrison violated Section 8(a)(1) of the Act by surveilling its employees' protected activity and violated Section 8(a)(2) of the Act by assisting the Carpenters obtain authorization cards and by granting 9(a) recognition to the Carpenters based on the tainted cards. I would also affirm the Board's prior finding that the Carpenters violated Section 8(b)(1)(A) of the Act by accepting the assistance and recognition and entering into a new collective-bargaining agreement with Garner/Morrison.

Dated, Washington, D.C. August 27, 2018

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Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD